Supreme Court, U.S.
FILED
APR 12 1995
OFFICE OF THE CLERK

No. 94-6187

In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas
H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders
440 Louisiana, Suite 310
P.O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600
**Counsel of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE COURT SHOULD ADDRESS THIS CASE AS PRESENTED AND DECIDED IN THE FIFTH CIRCUIT AND SHOULD REVERSE THE FIFTH CIRCUIT'S OPINION BECAUSE CONGRESS CANNOT AUTHORIZE THE IMPOSITION OF CUMULATIVE PUNISHMENT FOR ONE OFFENSE IN TWO CRIMINAL PROCEEDINGS 1

II. THE GOVERNMENT'S CATEGORICAL APPROACH TO THE DOUBLE JEOPARDY ANALYSIS IGNORES THIS COURT'S PRECEDENT AND CALLS FOR RESOLUTION OF THE CONSTITUTIONAL QUESTION IN A VACUUM 3

III. HOLDING THAT FURTHER PROSECUTION AND PUNISHMENT OF MR. WITTE VIOLATES THE DOUBLE JEOPARDY CLAUSE WILL NOT HAVE "FAR-REACHING AND UNTENABLE IMPLICATIONS" IF THAT HOLDING IS BASED ON THE FACTS AND OPERATION OF THE GUIDELINES IN THIS CASE 7

A. Holding in Favor of Mr. Witte Does Not Undermine Enhancements for Prior Convictions Under the Guidelines..... 7

B. The Complaint About the Limitation on Obtaining Successive and Additional Punishments Through Manipulating the Charges in the Indictment Is a Complaint About the Commission's Policy Choices and Should Be Addressed to the Commission..... 8

TABLE OF CONTENTS – Continued

Page

C. Problems of Due Process Raised by the Parties at the Sentencing in the First Prosecution Were Abandoned by Failure to Perfect an Appeal and Are Not Presented For Resolution on this Record 11

D. Holding in Favor of Mr. Witte Will Not Result in an "Amorphous Inquiry" into Conduct, and the Guidelines Already Require a Limited Inquiry into Conduct 14

IV. THE GOVERNMENT PROVIDES THE COURT WITH NO AUTHORITY FOR IGNORING THE CLEAR LANGUAGE AND POLICY CHOICES EXPRESSED IN THE GUIDELINES 16

V. THE GUIDELINES DO MORE THAN CHANNEL A COURT'S DISCRETION 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Smith, 490 U.S. 794 (1989) 5

Albernaz v. United States, 450 U.S. 333 (1981) 18

Benton v. Maryland, 395 U.S. 784 (1969) 13

Burns v. United States, 501 U.S. 129 (1991) 16

Chaffin v. Stynchcombe, 412 U.S. 17 (1973) 5

Dep't of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994) 2, 3, 4, 5, 13, 18

Hughey v. United States, 495 U.S. 411 (1990) 18

Kinder v. United States, 112 S. Ct. 2290 (1992) 13

Ladner v. Smith, 941 F.2d 356 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1665 (1992) 14

Liparota v. United States, 471 U.S. 419 (1985) 16

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 12

Miller v. Florida, 482 U.S. 423 (1987) 5, 19, 20

Mistretta v. United States, 488 U.S. 361 (1989) 17

Moskal v. United States, 498 U.S. 103 (1990) 18

Payne v. Tennessee, 501 U.S. 808 (1991) 17

Sharpton v. Turner, 964 F.2d 1284 (2d Cir.), *cert. denied*, 113 S. Ct. 494 (1992) 14

United States v. Dixon, 113 S. Ct. 2849 (1993) 9

United States v. Felix, 112 S. Ct. 1377 (1992) 10

United States v. Halper, 490 U.S. 435 (1989) 2, 3, 4, 5, 13, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990) 13

United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) 15

United States v. Trujillo, 959 F.2d 1377 (7th Cir.), *cert. denied*, 113 S. Ct. 277 (1992) 13

United States v. Wittie, 25 F.3d 250 (5th Cir. 1994) ...1, 2

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 6

Whitmore v. Arkansas, 495 U.S. 149 (1990) 6

Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) 16

STATUTES

18 U.S.C. § 3551 16

18 U.S.C. § 3553 16

18 U.S.C. § 3742 16

21 U.S.C. § 841 ..... 10, 17, 19

21 U.S.C. § 960 ..... 10, 17

28 U.S.C. § 991 16

28 U.S.C. § 994 16

28 U.S.C. § 998 16

TABLE OF AUTHORITIES – Continued

Page

SENTENCING GUIDELINES

U.S.S.G. Ch. 1, Pt. 4(a) 9, 14, 17

U.S.S.G. § 1B1.1 ..... 9, 17, 18

U.S.S.G. § 1B1.3 ..... 9, 17, 18

U.S.S.G. § 2D1.1 ..... 9, 10, 17

U.S.S.G. Ch. 3, Pt. D 18

U.S.S.G. § 3D1.2 ..... 9, 17

U.S.S.G. Ch. 4 8

U.S.S.G. § 4A1.2(a)(1) 8

U.S.S.G. § 5G1.3(b) 15

No. 94-6187

In The

Supreme Court of the United States

October Term, 1994

STEVEN KURT WITTE,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. THE COURT SHOULD ADDRESS THIS CASE AS PRESENTED AND DECIDED IN THE FIFTH CIRCUIT AND SHOULD REVERSE THE FIFTH CIRCUIT'S OPINION BECAUSE CONGRESS CANNOT AUTHORIZE THE IMPOSITION OF CUMULATIVE PUNISHMENT FOR ONE OFFENSE IN TWO CRIMINAL PROCEEDINGS.

As stated in the Brief for Petitioner (Br. 33-34), the Court of Appeals for the Fifth Circuit assumed that both prosecutions at issue here involved the "same offense," and it "address[ed] the issues in this case . . . as they were presented by the parties." *United States v. Wittie*, 25 F.3d

250, 255 & n.17 (5th Cir. 1994); (J.A. 145 & n.17). For purposes of its analysis, the court also accepted that Mr. Witte "had been punished by inclusion of the cocaine activities in relevant conduct" in the first prosecution. *Id.* at 258; (J.A. 154). Contrary to the dictates of *Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945, 1948 (1994), and *United States v. Halper*, 490 U.S. 435, 450-51 & n.10 (1989), the court of appeals held that Mr. Witte could be punished for the offense again in a second criminal proceeding, because a second punishment had been authorized by Congress under section 5G1.3(b) of the United States Sentencing Guidelines. *Wittie*, 25 F.3d at 258, 261; (J.A. 154, 162); *see also* Pet. Br. 33-34.

In the Brief for the United States, the Government argues that "there is no basis for treating these two prosecutions as involving the same offense," and that the "government's brief in the court of appeals made no such assumption." Gov't Br. 12 & n. 5. In its opinion, however, the court of appeals did not state whether its conclusion about the assumptions of the parties was based on the briefs or oral arguments of the parties or the facts in or posture of the record. *See Wittie*, 25 F.3d at 255 & n.17; (J.A. 145 & n.17). For example, the court's conclusion could have been based on the unappealed ruling made by the district court during the sentencing in the first prosecution, which rejected the Government's argument that the cocaine transactions and the marijuana transactions were "separate agreements and separate offenses," (J.A. 61, 68-69), and the Government's concession that it was "not now attacking the sentencing court's inclusion of the cocaine as relevant conduct." Gov't C.A. Reply Br. 6.

In any event, no petition for rehearing on the assumption underlying the opinion was filed in the court

of appeals, and the issue was not raised in the petition for writ of certiorari or the Government's brief in response to the petition. Under similar circumstances, this Court refused to address the issue of whether the criminal conviction and the subsequent tax assessment in *Kurth Ranch* involved separate offenses. *See Kurth Ranch,* 114 S. Ct. at 1942 n.9. Instead, the Court addressed the issue as decided in the court below and found a violation of the Double Jeopardy Clause.

As in *Kurth Ranch,* the Court should decide this case in the posture that it was presented and decided in the court below. In its brief, the Government now concedes that "congressional intent does not control the constitutional analysis in this context." Gov't Br. 27. In light of that concession and the posture of the case and the decision in the court of appeals, *Kurth Ranch* and *Halper* control this case. Under the unique circumstances of this case, therefore, the Court should reverse the judgment of the court of appeals and remand with instructions to affirm the district court's dismissal of the indictment.

II. THE GOVERNMENT'S CATEGORICAL APPROACH TO THE DOUBLE JEOPARDY ANALYSIS IGNORES THIS COURT'S PRECEDENT AND CALLS FOR RESOLUTION OF THE CONSTITUTIONAL QUESTION IN A VACUUM.

The Government argues that a person cannot be "punished" for an "offense" in a particular proceeding for double jeopardy purposes unless the offense was the subject of an indictment and conviction. Gov't Br. 14-16. In other words, even if uncharged conduct or an uncharged offense is "considered" or used to impose a

punitive sanction on a person, the person has not been "punished" for the offense for double jeopardy purposes unless the person has been prosecuted explicitly for that offense. *See id.*

This analysis of the multiple punishment protection of the Double Jeopardy Clause ignores this Court's precedent and views the problem in a vacuum without requiring any scrutiny of the rules under which the punishment was imposed or the manner in which the punishment resulted from those rules. First, in *Kurth Ranch* and in *Halper,* which involved civil proceedings, this Court found that the Double Jeopardy Clause's protection against multiple punishments had been violated even though no "offenses" had been indicted and no "punishment" had been imposed on an "offense" of conviction in those proceedings. *See Kurth Ranch,* 114 S. Ct. at 1942-43; *Halper,* 490 U.S. at 504. If the Government's *per se* rule – that "punishment" is imposed only for an "offense" that is the subject of conviction in a proceeding – were applicable to a claim of unconstitutional multiple punishments, the Court could not have found constitutional violations in *Halper* and *Kurth Ranch.* If "punishment" can be imposed for double jeopardy purposes in civil proceedings when no indictment has been filed and no conviction obtained, then "punishment" can be imposed on an "offense" that is not contained in a particular indictment.

Second, the Court specifically rejected a similar argument made by the Government in *Halper.* There, the Government argued for the application of the *per se* rule that "punishment in the relevant sense is meted out only in criminal proceedings." *Halper,* 490 U.S. at 447. The Court rejected this categorical approach to the assessment of the

Double Jeopardy Clause's proscription of multiple punishments, stating: "This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Id.* (footnote omitted).

The Government's categorical approach to the double jeopardy issue in this case similarly seeks to have the Court analyze the issue of multiple punishments without assessing the sanction imposed and the machinery or rules used by the state in imposing the sanction. In fact, the Government's approach is tautological: if the offense was stated in the indictment, then the defendant was punished for it, and if it was not stated in the indictment, then the defendant was not punished for it. In cases challenging the constitutionality of punishments imposed upon citizens, however, the Court has scrutinized carefully the particular rules and systems challenged and the resulting punishments. *See, e.g., Kurth Ranch*, 114 S. Ct. at 1946-48 (reviewing the specific characteristics of the tax imposed); *Halper*, 490 U.S. at 441-49 (analyzing the issue on the facts of the civil penalty before the Court); *Alabama v. Smith*, 490 U.S. 794, 797-801 (1989) (resolving due process issue on specific fact that more information was available after trial than after invalid guilty plea); *Miller v. Florida*, 482 U.S. 423, 429-35 (1987) (analyzing operation of Florida sentencing guidelines to determine ex post facto challenge); *Chaffin v. Stynchcombe*, 412 U.S. 17, 26-28 (1973) (resolving due process issue on specific fact that resentencing followed retrial by a different jury).

Third, the Government's approach also requires the Court to decide the case in a vacuum and reach a resolution that applies in all cases regardless of the sentencing

system. Thus, in various passages in its brief, the Government argues that, because "petitioner requests judgment on constitutional grounds, the logic of the Court's decision will apply to all state and federal charging and sentencing schemes, now and in the future," Gov't Br. 19 n.9, and that petitioner's theory "would logically apply to any sentencing scheme in which uncharged conduct is used to enhance the sentence for the offense of conviction." Gov't Br. 16 n.7.

This Court never has held that decisions on the constitutionality of a particular sentencing scheme as applied to a particular defendant must apply necessarily to all federal and state sentencing schemes "now and in the future" regardless of the facts. Indeed, Article III of the Constitution is to the contrary and requires the Court to decide only "cases" and "controversies" involving the legal rights of persons actually injured. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

The Government's standard for the resolution of constitutional questions begs the difficult and fact-specific issue in this case: Whether Mr. Witte can be prosecuted and punished yet again for the cocaine offenses when those offenses previously were included in relevant conduct under the United States Sentencing Guidelines. As argued in the Brief for Petitioner, the answer is that he cannot be prosecuted and punished again because he was punished in the first prosecution for all drug offenses and all drug quantities for which he could be punished under federal statutes and the guidelines and that punishment was imposed pursuant to and as mandated by the guidelines. *See* Pet. Br. 26, 28, 31, 47-48. To argue, as the

Government does, that the issue is resolved by the mere fact that the Government placed different language in the two indictments at issue avoids the difficult fact-specific question posed by the interface of the guidelines and the protections of the Double Jeopardy Clause in this case.

III. HOLDING THAT FURTHER PROSECUTION AND PUNISHMENT OF MR. WITTE VIOLATES THE DOUBLE JEOPARDY CLAUSE WILL NOT HAVE "FAR-REACHING AND UNTENABLE IMPLICATIONS" IF THAT HOLDING IS BASED ON THE FACTS AND OPERATION OF THE GUIDELINES IN THIS CASE.

The Government argues that this Court's holding that further prosecution and punishment of Mr. Witte violates the Double Jeopardy Clause "would have far-reaching and untenable implications." Gov't Br. 16-20. Nevertheless, if the Court decides the case on its facts and the application of the guidelines to those facts, no such "far-reaching and untenable implications" will result from a holding in Mr. Witte's favor.

A. Holding in Favor of Mr. Witte Does Not Undermine Enhancements for Prior Convictions under the Guidelines

The Government first argues that a ruling that the Double Jeopardy Clause prohibits further prosecution and punishment would undermine the Court's precedent upholding "common sentence enhancements based on prior convictions." Gov't Br. at 16-17. As explained in the Brief for Petitioner, however, the guidelines specifically address criminal history in a measure distinct from the

base offense level. Pet. Br. 30; *see also* U.S.S.G. Ch. 4. Thus, a holding that Mr. Witte had been punished under the base offense level in the first criminal proceeding for all the offenses that he had committed could not be used to attack the criminal history scoring under the guidelines.

In addition, an argument concerning criminal history scoring under the guidelines that was strictly analogous to Mr. Witte's argument in this case would prevail under the express language of the guidelines. For example, assume that a defendant argued in a second federal prosecution that his criminal history score should not be increased by a prior conviction and sentence because the prior conviction and sentence were imposed for facts and transactions related to the present prosecution. Under the guidelines, the defendant would prevail because "prior sentence" means "any sentence previously imposed . . . for *conduct not* part of the instant offense." U.S.S.G. § 4A1.2(a)(1)(emphasis added). Far from dismantling the use of prior convictions as enhancements under the guidelines, Mr. Witte's position on punishment under the base offense level is, by analogy, in accordance with the express approach of the guidelines.

B. The Complaint About the Limitation on Obtaining Successive and Additional Punishments Through Manipulating the Charges in the Indictment Is a Complaint About the Commission's Policy Choices and Should Be Addressed to the Commission.

The Government next argues that, if the Court finds a double jeopardy violation: (1) this "would also complicate, and probably prevent, most prosecutions for conspiracy after

the defendant had previously been convicted of a substantive offense based on the same conduct," Gov't Br. at 17; (2) there often are valid reasons for not prosecuting related crimes in the same proceeding, such as when venue lies in different districts or an investigation on one crime has not been completed, Gov't Br. at 24; and (3) double jeopardy principles purportedly are not necessary to prevent abuses because "the government is surely 'deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources.' " Gov't Br. 25 n.13 (quoting *United States v. Dixon*, 113 S. Ct. 2849, 2863 n.15 (1993)).

The Government's first argument that it is Mr. Witte's "theory," Gov't Br. 17, that would limit subsequent prosecutions and punishments for conspiracy after conviction for a substantive offense is misguided because it is not Mr. Witte's theory that does so but the express language and operation of the guidelines. The Sentencing Commission, under mandate of Congress, wrote the rules of punishment "with an eye toward eliminating unfair treatment that might flow from count manipulation." U.S.S.G. Ch. 1, Pt. 4(a). The Commission also defined "offense" as "the offense of conviction and all relevant conduct," *id.* § 1B1.1, comment (n.1(l)), and determined that: (1) a defendant is to be punished for all related criminal activity "whether or not charged as a conspiracy," *id.* § 1B1.3(a)(1)(B); (2) related multiple counts are grouped whether or not the defendant is convicted of multiple counts, *id.* § 1B1.3, comment. (n.3); (3) the base offense level is calculated on the total amount of drugs involved in all related offenses, *id.* §§ 2D1.1(c), 3D1.2, comment. (n.4, ex.4), (n.6 & ex.5); and (4) "[o]ffenses under 21

U.S.C. §§ 841 and 960 receive identical punishment." U.S.S.G. § 2D1.1, comment. (backg'd.) (italics deleted).

The Government's complaint that it no longer can repeatedly change the charges in successive indictments and repeatedly punish a defendant for drug offenses involving substantially the same harm, *see* U.S.S.G. § 3D1.2, is a complaint about the policy determinations made by the Sentencing Commission and implemented by the guidelines. To the extent that the Government is asking the Court to interpret the Double Jeopardy Clause to allow it to do again under the new specific rules of punishment what it once did in the absence of those rules, the Government's remedy lies with Congress and the Commission and not in this Court.[1]

In addition, the Government's argument that there often are valid reasons for not prosecuting related crimes in the same proceeding cannot trump the Commission's policy determinations to *punish* all such crimes in one proceeding. Nor is this argument compelling on the facts of this case. Venue did not lie in different districts, and

---

[1] Nor does *United States v. Felix*, 112 S. Ct. 1377 (1992), answer the question presented in this case. *Felix* did not raise the issue of whether the defendant was being twice punished in violation of the Double Jeopardy Clause, and the offenses in that case were not subject to punishment under the guidelines. *See id.* at 1379-81 (offenses occurred prior to November 1, 1987, and constitutional challenge was to subsequent prosecution). Thus, the issue presented here concerning the interface between the rules of punishment mandated by the guidelines and the Double Jeopardy Clause's proscription of multiple punishment was not before the Court. Nor were the Commission's specific policy choices and rules regarding punishment of drug offenses present in that case.

the two indictments were filed in the same courthouse. (J.A. 9, 82). With regard to the necessity to keep the facts or agents secret in order to complete further investigation, the Government revealed in the public record all facts and the agents and participants involved in all offenses in the criminal complaint and affidavit it filed at the beginning of the first prosecution. (J.A. 3-8). The prosecutor, moreover, admitted to the district court in the hearing on the motion to dismiss the second prosecution that the Government's evidence against Mr. Witte in the second case was in the Government's possession during the first prosecution. (J.A. 90-91).

Finally, with regard to the press of demands upon prosecutorial and judicial resources limiting successive prosecutions, the district court specifically noted its frustration with the waste of resources resulting from the second prosecution and punishment of Mr. Witte. (J.A. 100-01) ("if all you want is another 50 months or 60 months, why didn't you just get it out of him in the first place?"). Thus, the Government's argument about the crimp on successive prosecutions and punishments is a complaint about the Commission's policy determinations and is not compelling on the facts of this case.

C. Problems of Due Process Raised by the Parties at the Sentencing in the First Prosecution Were Abandoned by Failure to Perfect an Appeal and Are Not Presented for Resolution on this Record.

The Government next argues that barring further punishment of Mr. Witte in this case cannot "be squared with this Court's cases that allow a sentencing court to

enhance a sentence based on conduct that has never resulted in a conviction." Gov't Br. 17. Supposedly, a holding in favor of Mr. Witte would make "constitutionally suspect" the "lower standard of proof and less rigorous procedural protections applied in criminal sentencing." Gov't Br. 18 (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 84-92 (1986)).[2]

Questions about the reach of *McMillan* and the proper burden of proof at guideline sentencings are not at issue in this appeal. The Government did argue at Mr. Witte's sentencing in the first prosecution that the charged offense and the cocaine offenses were "separate agreements and separate offenses" and should *not* be punished together. (J.A. 61).[3] Mr. Witte also objected on

---

[2] In *McMillan*, this Court held that Pennsylvania's use of the preponderance-of-the-evidence standard in sentencing a defendant to a mandatory minimum sentence within an existing sentencing range did not violate due process because the legislature simply had taken "one factor that has always been considered by sentencing courts to bear on punishment – the instrumentality used in committing a violent felony – and dictated the precise weight to be given that factor if the instrumentality is a firearm." 447 U.S. at 89-90.

[3] Interestingly, at the sentencing, the Government took the position that Mr. Witte should *not* be punished under the first indictment for the cocaine offenses (J.A. 60-62), and at the hearing on the motion to dismiss, it agreed that the proper guideline range for the first indictment was 63 to 78 months, from which the sentencing judge should have departed downward. (J.A. 94-95) (prosecutor's statement at the hearing on the motion to dismiss that the court was "preaching to the choir" that the downward departure was from a sentence that Mr. Witte should not "have received in the first place"). On the Government's position in the district court, Mr. Witte was erroneously punished for the cocaine offenses that should have been punished

the ground that he was being denied due process of law due to the lessened burden of proof. (J.A. 64). Neither party perfected an appeal of the first prosecution, however. The state of the record, therefore, calls for a decision about whether Mr. Witte was previously punished under the guidelines for the cocaine offenses regardless of whether the proper burden of proof was employed at the sentencing in the first prosecution. Certainly, in *Halper* and *Kurth Ranch*, the Court was not required and did not reach out to resolve due process issues in finding a violation of the Double Jeopardy Clause's proscription against multiple punishments. That due process might require a heightened standard of proof when the results of guideline enhancements are extreme is a question that must be resolved by the circuit courts and perhaps this Court in some other case on a different record. *See, e.g., United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir.), *cert. denied*, 113 S. Ct. 277 (1992); *United States v. Kikumura*, 918 F.2d 1084, 1102-03 (3d Cir. 1990); *see also Kinder v. United States*, 112 S. Ct. 2290, 2291-92 (1992) (White, J., dissenting from denial of certiorari).

---

only on the presentment of a separate indictment. On that position, Mr. Witte should not be punished again because he cannot be placed in jeopardy a second time if he was erroneously placed in jeopardy before. *Cf. Benton v. Maryland*, 395 U.S. 784, 796-97 (1969) (retrial prohibited when prior acquittal resulted from an invalid indictment).

D. Holding in Favor of Mr. Witte Will Not Result in an "Amorphous Inquiry" into Conduct, and the Guidelines Already Require a Limited Inquiry into Conduct.

The Government argues that Mr. Witte's "view would also require sentencing courts to translate 'acts and omissions' taken into account at the prior sentencing . . . into 'offenses' that could be compared to the offense charged in a subsequent prosecution." Gov't Br. 19-20 (citation omitted). This purportedly would be an "amorphous" inquiry. Gov't Br. 20.

The inquiry concerning the instant offense and base offense level required in this or other guidelines cases is not "amorphous" and requires less inquiry into conduct than that required by other provisions of the guidelines. First, because the Commission wrote the guidelines in terms of conduct, any question about punishment will involve at least a limited question about conduct. *See* U.S.S.G. Ch. 1, Pt. A.4(a) (guidelines are description of generic conduct). Second, the presentence report in a federal case summarizes the offense conduct and particularly specifies the "instant offense" for which a defendant is being punished. *See* PSR, para. 35. Thus, there is no problem of attempting to discern the conduct that was prosecuted or punished under the laws of the different states. *See, e.g., Sharpton v. Turner*, 964 F.2d 1284, 1285-86 (2d Cir.), *cert. denied*, 113 S. Ct. 494 (1992); *Ladner v. Smith*, 941 F.2d 356, 358 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1665 (1992).

Third, even the Government in its brief has no problem in this case discerning from the offense conduct

section of the presentence report that Mr. Witte's punishment was determined at least in part on the marijuana and cocaine he "planned to import." Gov't Br. 4; *see also id.* at 5 (speaking of "1990 importation offenses"). Nor does it pose a problem for appellate courts in light of the specific descriptions and summaries in federal presentence reports. *See, e.g., United States v. McCormick*, 992 F.2d 437, 438 (2d Cir. 1993) (affirming dismissal of *only* those counts that previously had been used to determine the defendant's prior sentence). In fact, reading the specific description of the "instant offense" in the presentence report may be the clearest way (if not the only way) to determine specifically for what a defendant has been punished in a prior proceeding under the guidelines.

Finally, section 5G1.3(b) of the guidelines, which the Government embraces, requires much more analysis of conduct underlying offenses than the analysis required by Mr. Witte's position. *See* U.S.S.G. § 5G1.3(b); *see also* Gov't Br. 26-27. To apply section 5G1.3(b) to alleviate any double jeopardy problem resulting from multiple punishment of a prior offense of a less serious nature, *see McCormick*, 992 F.2d at 441 n.3, the sentencing court must set the "offense level in the second prosecution . . . taking into account conduct that already has been the subject of a conviction and sentence." *Id.* This may involve translating conduct underlying even state offenses into federal offenses. *See* U.S.S.G. § 5G1.3, comment. (n.2) (lesser state drug offense converted into federal offense conduct). Because this more complex analysis must be used under the guidelines to prevent a double jeopardy problem under section 5G1.3(b), the relatively simple analysis of reading the specific description of the "instant offense" in a federal presentence report that was prepared previously

will not prove to be an "amorphous inquiry" that will be unmanageable in the district courts in cases such as Mr. Witte's, where *all* offenses previously have been punished.

IV. THE GOVERNMENT PROVIDES THE COURT WITH NO AUTHORITY FOR IGNORING THE CLEAR LANGUAGE AND POLICY CHOICES EXPRESSED IN THE GUIDELINES.

Although the Government acknowledges that the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns v. United States*, 501 U.S. 129, 132 (1991), the Government views the revolution as having no effect on constitutional analysis. Gov't Brief 20; *id.* at 20-27 (arguing that the revolution was one of consistency and transparency only). Whatever the scope of the revolution, Congress mandated the promulgation and application of the United States Sentencing Guidelines, 18 U.S.C. § 3553(b); 28 U.S.C. § 994(a)(1), (2), and the Sentencing Commission expressly stated in the guidelines specific rules and principles governing the punishment of violations of federal criminal law. The Government provides the Court with no authority for ignoring the clear language and policy choices expressed in the guidelines for purposes of the constitutional analysis.

Federal crimes "are solely creatures of statute," *Liparota v. United States*, 471 U.S. 419, 424 (1985), and "the primary responsibility for fixing penalties lies with the legislature." *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2200

(1993). The assessment of the harm caused by a defendant's criminal acts plays a significant role in the determination of the punishment to be imposed in Anglo-American jurisprudence in general and under the guidelines in particular. *See Payne v. Tennessee*, 501 U.S. 808, 820 (1991). In the present system of punishment for federal crimes, "Congress prescribed the specific tool – the guidelines system – for the Commission to use in regulating sentencing." *Mistretta v. United States*, 488 U.S. 361, 374 (1989).

The Sentencing Commission explicitly defined "offense" as "the offense of conviction and all relevant conduct under § 1B1.3 (relevant conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. § 1B1.1, comment. (n.1(l)). It wrote the rules of punishment for multi-count convictions "with an eye toward eliminating unfair treatment that might flow from count manipulation," U.S.S.G. Ch. 1, Pt. A.4(a), and to avoid multiple punishment from multi-count convictions involving the same harm or "fungible items," such as "separate drug transactions." *Id.* Pt. A.4(e).

The jointly undertaken criminal activity of a defendant in a drug prosecution is expressly to be used to calculate his base offense level whether or not charged as a conspiracy, and multiple drug counts are to be grouped based on the total quantity of drugs whether or not the defendant is convicted of multiple counts. U.S.S.G. §§ 1B1.3(a)(1)(B), 1B1.3, comment. (n.3), 2D1.1(c), 3D1.2(d). Offenses under 21 U.S.C. §§ 841 and 960, moreover, receive identical punishment. U.S.S.G. § 2D1.1, comment. (backg'd.). The express language and policy choices embedded in the guidelines reflect the Commission's attempt "to limit the significance of the formal

charging decision and to prevent multiple punishment for substantially identical offense conduct." U.S.S.G. Ch. 3, Pt. D, intro. comment.

If the questions of for what and how a criminal defendant is to be punished in a single prosecution are determined by the intent of the legislature, *see Albernaz v. United States*, 450 U.S. 333, 337 (1981), the Court should look to the plain language of the guidelines to determine that intent. *Cf. Moskal v. United States*, 498 U.S. 103, 108 (1990). Under that plain language, the "offense" for which Mr. Witte was punished included "the offense of conviction and all relevant conduct." U.S.S.G. § 1B1.1 comment. (n.1(l)). The punishment that attached was based on all harm embodied in his jointly undertaken activity whether charged or uncharged as a conspiracy or otherwise. U.S.S.G. § 1B1.3(a)(1)(B); *id.* comment. (n.3). Having been so punished, Mr. Witte cannot be punished again. *See Kurth Ranch*, 114 S. Ct. at 1498; *Halper*, 490 U.S. at 450-51 & n.10.

The Government asks the Court to ignore the express definition of "offense" and the language and policy choices embedded in the guidelines and to focus on a seemingly metaphysical "independent 'offense' for which a defendant suffers independent 'punishment.' " Gov't Br. 25. The Government's approach is based on the assertion that Congress has not changed "the nature of the 'offense' for which the defendant has been punished." That assertion, however, fails to come to grips with the express language of the guidelines and certainly does not authorize the Court to ignore it. *Cf. Hughey v. United States*, 495 U.S. 411, 422 (1990) (plain language of the statute controls).

V. THE GUIDELINES DO MORE THAN CHANNEL A COURT'S DISCRETION.

Finally, the Government asserts that the guidelines merely "channel . . . discretion" in a "uniform and predictable way." Gov't Br. 22. In *Miller v. Florida*, 482 U.S. 423 (1987), however, the Court rejected a similar argument, finding that Florida's revised sentencing guidelines violated the Ex Post Facto Clause. *Id.* at 432-35. Even though the petitioner might have received the same sentence under the old guidelines, the revised guidelines made the sentence more onerous because they increased the presumptive sentencing range and alleviated the necessity of the trial judge's having to give reasons for his sentence, which would have been a departure under the old guidelines. *Id.* at 432-33. The Court further found that the revised guidelines were not simply " 'guideposts' for use in the exercise of discretion." *Id.* at 435. Rather they "directly and adversely" affected the sentence the petitioner received and "created a high hurdle" that had to be cleared before discretion could be exercised. *Id.*

The Government's argument that the federal guidelines merely channel discretion and do not change "the substance" of sentencing, Gov't Br. 22, 25, flies in the face of the reasoning in *Miller*. The federal guidelines used the cocaine offenses to raise mandatorily Mr. Witte's presumptive range of sentencing to 292 to 365 months. *See* Pet. Br. 9 & n.3. Under the federal sentencing scheme in existence prior to the guidelines, the presumptive minimum sentence would have been five years in prison. 21 U.S.C. § 841(b)(1)(B). To argue that the increase in the presumptive range of sentencing by twenty years merely makes "more transparent" prior sentencing practice,

Gov't Br. 23, contradicts the reasoning of *Miller*, which concluded that such a change "directly and adversely" affects the rights of a defendant. *Miller*, 482 U.S. at 435.

CONCLUSION

For the foregoing reasons and the reasons set out in the Brief for Petitioner, the judgment of the Fifth Circuit Court of Appeals should be reversed, and the case should be remanded to that court with instructions to affirm the district court's dismissal of the indictment against the Petitioner in Case No. 92-207.

Respectfully submitted,

ROLAND E. DAHLIN II*
Federal Public Defender
Southern District of Texas

H. MICHAEL SOKOLOW
THOMAS S. BERG
Asst. Federal Public Defenders

440 Louisiana, Suite 310
P. O. Box 61508
Houston, TX 77208-1508
Telephone: (713) 238-9600

**Counsel of Record for Petitioner*

April 8, 1995